(3) (2)

Nos. 90-813 and 90-974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

HOUSTON LAWYERS' ASSOCIATION, *et al.*,
Petitioners,

vs.

JIM MATTOX, *et al.*,
Respondents.

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LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*,
Petitioners,

vs.

JIM MATTOX, *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM IN RESPONSE TO PETITIONS FOR CERTIORARI

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December 21, 1990

QUESTIONS PRESENTED

1. Whether the results standard of Section 2 of the Voting Rights Act, as amended, applies to elective judicial systems?

2. Whether a vote dilution challenge under the results standard of Section 2 of the Voting Rights Act, as amended, can be established against a system for electing judicial officials who function as solo decisionmakers?

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MEMORANDUM IN RESPONSE TO PETITIONS FOR CERTIORARI

This memorandum, filed on behalf of the state officials who were official-capacity defendants in the district court,[1] responds to two petitions for writs of certiorari arising from the same decision and presenting virtually identical questions for review. The two petitions are *Houston Lawyers' Association v. Mattox*, No. 90-813, and *League of United Latin American Citizens, Inc. v. Mattox*, No. 90-974. The petitioners in these two cases will be referred to as "HLA" in the case of No. 90-813 and "LULAC" in the case of No. 90-974.

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[1] These respondents are: the Attorney General of Texas (Jim Mattox); the Secretary of State of Texas (George S. Bayoud, Jr.), and the thirteen members of the Judicial Districts Board of Texas. The Judicial Districts Board is comprised of the Chief Justice of the Supreme Court of Texas (Thomas R. Phillips), the Presiding Judge of the Court of Criminal Appeals of Texas (Michael J. McCormick), the President of the Texas Judicial Council (Judge Joe Spurlock, II), an attorney (Leonard E. Davis) appointed by the Governor of Texas, and the Presiding Judges of the nine Administrative Judicial Regions in Texas (Judges Pat McDowell, Thomas J. Stovall, Jr., B. B. Schraub, John Cornyn, Darrell Hester, Sam B. Paxson, Weldon Kirk, Jeff Walker, and Ray D. Anderson). This memorandum will refer to them collectively as "state officials." Two Texas state district judges -- one from Harris County and one from Dallas County -- intervened in the district court proceeding as defendants in their personal capacities only. This memorandum is not filed on their behalf. Likewise, this memorandum is not filed on behalf of six Texas state district judges based in Bexar County, Texas, who appealed the district court's denial of their attempted intervention but failed to obtain an intervention ruling from the Fifth Circuit. An attorney (Mr. Wheatley) purporting to represent them has entered an appearance in this Court. Insofar as he is appearing to represent them in their official capacities as state officials, the Attorney General of Texas challenges the attorney's legal authority to appear.

OPINIONS BELOW

HLA's Appendix omitted four district court orders modifying its Memorandum Opinion and Order of November 8, 1989. HLA App. 183a-304a. It also omitted the district court's two orders on remedy. The omitted orders constitute the appendix following this memorandum.

JURISDICTION

HLA and LULAC invoke this Court's jurisdiction under 28 U.S.C. § 1254(1) to review the Fifth Circuit's decision of September 28, 1990.

STATUTES INVOLVED

HLA's petition, at 3, omits from the end of its quotation of subsection (a) of the current version of Section 2 of the Voting Rights Act the phrase "in contravention of the guarantees set forth in § 1973b of this title, as provided in subsection (b) of this section." LULAC's petition, at 2-3, contains the complete text of Section 2.

STATEMENT OF THE CASE

The Fifth Circuit opinion accurately summarizes the procedural history of this case; however, heeding the Court's Rule 15.1 admonition to respondents to address any perceived misstatements of fact or law in certiorari petitions which potentially bear on the issues before the Court, the state officials supplement the Fifth Circuit's summary in response to some of the statements in the petitions of HLA and LULAC.

The Proceedings Below

At the time of trial in September, 1989, the district court had before it constitutional and statutory challenges to the Texas system of electing judges in ten Texas counties, not eleven as stated by HLA and not nine as stated by LULAC. The ten targeted counties contained 172 of the then-extant 384 (not 375) judicial districts in Texas. Now, the ten targeted counties contain 174 of the 386 judicial districts in Texas.[2]

In its November 8th liability decision, as modified in four subsequent orders, the district court rejected the plaintiffs' constitutional claims. It found that the "present system" is not maintained as a tenuous pretext for discrimination. HLA App. 283a. It later determined that the plaintiffs failed to prove "that the present at large system for electing State District Judges in the State of Texas was instituted with the specific intent to dilute, minimize or cancel the voting strength of Black and/or Hispanic voters." HLA App. 302a. No one appealed this determination.

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2 Awaiting decision by a three-judge federal district court in Texas is a challenge under Section 5 of the Voting Rights Act, as amended, to 13 of the 386 judicial districts in Texas, plus four judicial districts which will operate only if certain as-of-yet unmet preconditions are satisfied (and which would bring the total number of Texas judicial districts to 390). Six of the 13 (and 10 of the total of 17) newly challenged districts are in the ten counties targeted in this lawsuit. The case, tried on December 12, 1990, is *Mexican American Bar Association of Texas, et al. v. Texas, et al.*, Civ. Action No. MO-90-CA-171 (W.D. Tex.) ("*MABA*"). The challenge, lodged at overlapping, but not wholly contiguous, targets by private plaintiffs and the United States, principally is based on the November 5, 1990, letter from the Department of Justice's Assistant Attorney General for Civil Rights, HLA App. 305a-308a, as substantially modified by his letter of November 20, 1990, which is not in HLA's Appendix.

Tellingly, HLA and LULAC offer differing characterizations of the constitutional challenge rejected by the district court. HLA characterizes its challenge as one against "the at-large, winner-take-all, majority vote, numbered post requirement" for electing district judges. HLA Pet., at 5. LULAC characterizes the challenge more narrowly as one directed at a state constitutional provision establishing the manner by which smaller-than-countywide judicial districts may be created. LULAC Pet., at 6. The breadth of the district court's decision on the constitutional issue indicates that HLA's characterization is nearer the mark.

Invoking the three-part test of *Thornburg v. Gingles*, 478 U.S. 30 (1986), and canvassing other factors enumerated in the Senate Report on the 1982 amendments to the amended Section 2, the district court found unintentional vote dilution in all the targeted judicial districts in all the targeted counties and, consequently, a violation of the effects standard established in Section 2 of the Voting Rights Act.

In the course of reaching this result, the district court rejected the state officials' argument that any analysis of the plaintiffs' claim of unintentional vote dilution must take into account evidence about the impact of partisan voting patterns on electoral outcomes. Despite its characterization of *Whitcomb v. Chavis*, 403 U.S. 124 (1971), as having rejected a racial vote dilution challenge on the ground that partisan voting best accounted for electoral outcomes, the district court concluded that "[p]arty affiliation is ***simply irrelevant***[.]" HLA App. 287a (emphasis added).

The district court thus refused to assess in any fashion the evidence offered to demonstrate that partisan voting patterns best accounted for electoral outcomes in each of the targeted counties. The facts relevant to HLA's statement, HLA Pet., at 11, that race consistently outweighed partisan affiliation in district judge elections in Harris County have never been evaluated by a court and remain hotly contested.

Subsequently, the district court ordered implementation of a non-partisan, single-member district election system for 1990 judicial elections in the targeted counties. It is to this specific remedy, and to no other, that HLA refers when it rather vaguely states that the district court found that "an alternative electoral scheme" would provide equal opportunity to minority voters, HLA Pet., at 12.

Through separate timely notices, the state officials first appealed the liability decision of November 8, 1989, and, later, the subsequent remedial orders of January 2, 1990, and January 11, 1990. On January 10, 1990, in an event omitted from HLA's petition, the state officials filed an emergency motion to stay the district court's remedy. (Other parties had filed stay motions earlier.) The Fifth Circuit filed its stay order on January 11, 1990.

The Fifth Circuit panel, in a two-to-one vote, held that unintentional vote dilution claims could not be established against Texas trial judges whom

the district court had found to be "sole, independent decision makers," HLA App. 289a.[3]

The Fifth Circuit in an *in banc* decision on September 28, 1990, held that the effects standard of Section 2 is inapplicable in challenges to systems for electing judges. Five members of the Fifth Circuit joined the second part of a concurring opinion by Judge Higginbotham adopting the rationale that vote dilution claims under Section 2's effects standard cannot be established against solo decisionmaker judgeships. Chief Judge Clark filed a special concurrence for himself only, and Judge Johnson was the sole dissenter from the court's judgment.

LULAC misleadingly characterizes the district court's findings on vote dilution as "undisturbed on appeal." LULAC Pet., at 8 n.3. The more accurate characterization is that they were "unaddressed" on appeal. A myriad of legal and factual disputes lying beyond the basic statutory coverage question remain unaddressed thus far at the appellate level. Many of them, including one of overwhelming significance (the relevance of partisan voting patterns to vote dilution analysis), have importance in voting rights law beyond the sphere of judicial elections and will have to be addressed by the Fifth Circuit on remand and perhaps subsequently by this Court even if HLA and LULAC prevail on the questions they have presented to the Court.

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3 Contrary to the implication in HLA's petition, at p. 8, this case and the *Chisom* case out of Louisiana were *not* argued together before the Fifth Circuit panel on April 30, 1990. They were argued separately and focused on different issues.

Statement of Facts

The state officials here seek only to correct certain omissions or misstatements in the certiorari petitions which appear potentially relevant to the basic coverage issues presented to the Court. As already explained, the Fifth Circuit did not have occasion to address the many facts in this case concerning, for example, electoral outcomes in the targeted counties over the last decade. Those facts are largely irrelevant in the case's posture before this Court, and the state officials will not undertake to refute every shade of error in HLA and LULAC's recitation of the underlying facts.

Texas elects its district judges through partisan elections. Contrary to HLA's statement that both primary and general elections for state district judge have a majority vote requirement, HLA Pet., at 9-10, only the party primary elections have such a requirement. A plurality suffices for victory at the general election.

HLA is technically incorrect in its statement that every targeted county elects more than one district judge, HLA Pet., at 10. Crosby County is implicated by only one of the challenged judicial districts, the 72nd, which encompasses Lubbock and Crosby counties.

HLA also is incorrect in the statement opening its recitation of the facts of the case that Texas judicial districts may be no smaller than an entire county, HLA Pet., at 9. Section 7a(i) of Article 5 of the Texas Constitution permits the voters of a county the opportunity to authorize the

creation of judicial districts smaller than the entire county.

ARGUMENT (STATEMENT)

No Opposition to Court Review

The state officials do not oppose this Court's granting of HLA and LULAC's petitions for writs of certiorari. The questions raised are of undoubted significance to the nation's jurisprudence, many of its state judicial systems, and minority voters.

Furthermore, the state officials are constrained to concede that the *in banc* Fifth Circuit decision of September 28, 1990, conflicts with the earlier Sixth Circuit decision in *Mallory v. Eyrich*, 839 F.2d 620 (6th Cir. 1988), although the two decisions do not run on such parallel tracks that they conflict in every particular element of their analysis. It is enough that there is a basic conflict in their results.

The preceding concession by the state officials should in no way be viewed as a concession that the Fifth Circuit reached an incorrect result. It did not; however, as the state officials understand it, the correctness of the result below is not a matter with which the Court is particularly concerned at this stage of its review process.

Likewise, the concession of the appropriateness of this case for plenary (not summary) review by the Court is not a concession of LULAC's argument that the Fifth Circuit decision conflicts with the Court's summary affirmances in two cases involving the interaction of Section 5 of the Voting Rights Act and judicial elections, *Georgia State Board of Elections v. Brooks*, Civ. No.

288-146 (S.D. Ga. 1989), *aff'd mem.*, 111 S.Ct. 288 (1990), and *Haith v. Martin*, 618 F.Supp. 410 (E.D. N.C. 1985), *aff'd mem.*, 477 U.S. 901 (1986). Despite the oft-repeated claim that the two provisions, Section 2 and Section 5, operate in tandem, they remain different provisions, with different language, different applications, and different repercussions. Holding, as the Fifth Circuit did, that the effects standard of Section 2 does not cover racial vote dilution challenges to judicial elections does not present a conflict with summary affirmances in Section 5 voting rights cases affecting judges which would warrant this Court's review.

Having distinguished Section 2 cases from Section 5 cases, the state officials do note a possible additional reason why the Court should grant certiorari in this case. The United States, through its Department of Justice, has indicated that it is not bound, ***even in Texas***, by the Fifth Circuit's *LULAC* decision on Section 2's reach. *See* HLA App. 307a.[4] Instead, argues the United States, Section 5 empowers it to independently assess Section 2's reach in Texas, regardless of governing Section 2 law in the Fifth Circuit.

Texas is a covered jurisdiction under Section 5. Surely, the United States, through the Justice Department, will acknowledge that it is at least bound by a decision of this Court on the reach of Section 2. Thus, a clear statement from this Court

[4] During the trial on December 12, 1990, in the *MABA* case, *supra* at 3 n.2, the attorney for the United States continued to defend this position, which appears to contravene the Court's assessment that the United States Attorney General "does not act as a court" in exercising his Section 5 powers of review of state legislation, *Allen v. State Board of Elections*, 393 U.S. 544, 549 (1969).

on Section 2's reach will enable Texas and the United States to agree to be bound by the same judicial rulings. Texas should not be compelled to defend its position on Section 2's reach twice, once before the Fifth Circuit and, afterwards, before the United States Attorney General.

Additional Issues Within The Court's Purview

HLA urges the Court to hear this case "at the same time" as the case of *Chisom v. Roemer*, No. 90-757, HLA Pet., at 22. Whatever may be meant by this request, the state officials suggest that the Court not consolidate this case with *Chisom*. No claims of intentional discrimination remain in this case, whereas, at least as the undersigned counsel understands it, such claims do remain part of the *Chisom* case.

HLA also urges the Court to review the subsidiary question of whether the principle announced in the Fifth Circuit's panel decision concerning unintentional vote dilution claims and solo decisionmakers is correct. HLA's argument for this approach is that leaving it for the Fifth Circuit to decide on remand (if, indeed remand ultimately is necessary) would be a "time-consuming and pointless course." HLA Pet., at 25.

While the state officials have no quarrel with HLA's suggestion, they would add that HLA's rationale also suggests the advisability of this Court also taking up another question, if it ultimately agrees with the petitioners on their arguments. That question is whether *Whitcomb v. Chavis*, *supra*, remains good law under Section 2 of the Voting Rights Act. As explained earlier, the district court, through its treatment of partisan voting patterns as a legal and factual irrelevancy,

treated *Whitcomb* as a dead letter in Section 2 vote dilution analysis.

There is no reason for this Court, should it disagree with the state officials on the scope of Section 2's coverage, not to reach this additional critical question in voting rights law. It potentially is a critical question in this case, and it assuredly will be a critical question in the litigation ensuing from the upcoming round of decennial reapportionment.

CONCLUSION

This case is a critical one for states which elect their judicial officers. The state officials, while vigorously defending the correctness of the result reached by the Fifth Circuit, recognize that the questions presented here need to be definitively settled. The requisite definitiveness can occur nowhere but here -- especially in light of the United States' puzzling intransigence on the question. Based upon the foregoing matters, the state officials do not oppose the Court's granting of HLA and LULAC's petitions for writs of certiorari and the setting down of these cases for plenary review.

Respectfully submitted,

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